Supreme Court, U.S.
FILED
JAN 29 1993
OFFICE OF THE CLERK

No. 92-929

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**In the**

**Supreme Court of the United States**

October Term, 1992

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Metropolitan School District of Wayne Township, Marion County, Indiana
**Petitioner,**

v.

Robert R. Davila
**Respondent.**

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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# BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

## INTEREST OF THE AMICUS

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the

boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, educational standards and for the adoption and enforcement of standards of student conduct.

Every school district in the country is eligible for funding under the Individuals with Disabilities Education Act (IDEA) and is, therefore, vitally interested in the subject of this case.

## REASONS FOR GRANTING THE WRIT

The policy at issue in this case is educationally unsound, in conflict with federal court decisions on the subject and is internally inconsistent. The policy at issue in this case is of vital interest to educators across the country. Respondent, in its zeal to protect children with disabilities, has instead adopted a policy that teaches such children that they are exempt from the rules of society and the consequences of violating those rules. Respondent has misinterpreted the Individuals with Disabilities Education Act and has extended this Court's decision in Honig v. Doe, 484 U.S. 305 (1988), far beyond its parameters.

In addition, there is a conflict in the circuits on the question covered in the policy.

## ARGUMENT

### Introduction

Amicus agrees with Petitioner's arguments regarding the process by which the policy at issue here was adopted by Respondent. The legal arguments on that question have been adequately addressed by Petitioner and by other amici herein. Amicus files this brief in order to draw this Court's attention to the importance to every school district in this country of the substantive issue raised by the policy, i.e., whether the Act authorizes Respondent to require school districts to continue to provide educational services to properly expelled students with disabilities under circumstances where nondisabled students would forfeit such a right. Respondent's policy is inadequately supported by either case law or the statute itself but the proscription in the policy is certainly clear. If school districts do not follow the policy, they risk losing federal funding under the Act

or, if challenged in an individual case, risk expensive legal proceedings under which the district may be liable for both its attorneys' fees and those of the plaintiff. This case may afford the only practical opportunity school districts will have to challenge the substantive merits of the policy. Amicus is, therefore, taking this opportunity to draw the Court's attention to the substantive legal issue noted above and the serious educational consequences of the policy.

## I. Respondent exceeded its authority under the Act by adopting a policy that goes beyond requiring equal opportunity for students with disabilities and, instead, requires schools to provide educational services to students with disabilities that their nondisabled peers are denied.

Section 1415(e)(3) of the Individuals with Disabilities Education Act (IDEA or "the Act"), 20 U.S.C. § 1401 et seq., the so-called "stay put" provision of the Act, provides that a disabled child "shall remain in [his or her] then current educational placement pending completion of review proceedings unless

parents and the school district otherwise agree." This Court held in Honig v. Doe, 484 U.S. at 326, that the provision "means what it says", ruling that there is no implicit dangerousness exception in the Act which would give schools the right to remove a dangerous disabled child from school. The students who were the subject of the decision had emotional disabilities, and their misconduct was a "manifestation" of the disability. Therefore, this Court had no need to address the followup question of whether the Act exempts students with disabilities from state or local rules which terminate all educational services to students who have been expelled from school for misconduct which is not a manifestation of their disabilities.

Respondent's policy cites Honig for the proposition that the "stay put" provision prohibits schools from "unilaterally excluding children with handicaps from the classroom for dangerous or disruptive conduct arising from

their handicapping condition." From its discussion of the holding in Honig, Respondent's policy jumps to a discussion of 20 U.S.C. 1412(1). That section requires each state, in order to qualify for assistance under the Act, to demonstrate that "the State has in effect a policy that assures all handicapped children the right to a free appropriate public education."

Respondent then goes on to rule that "children with handicaps -- including those who have been suspended or expelled -- must be provided a free appropriate public education," regardless of whether the misconduct was a manifestation of the disability. Respondent attempts to support this position by citing Mills v. Board of Education of District of Columbia, 348 F.Supp. 866 (1972). That case is inapposite because, like Honig, it involved children with behavioral handicaps. The action in expelling those children was discriminatory because it punished students

for conduct which they could not control. That action was found by the court to deny equal protection.

Respondent is correct that Mills and another so-called "landmark" case, Pennsylvania Assn. for Retarded Children (PARC) v. Commonwealth, 334 F.Supp. 1237 (E.D. Pa. 1971), were the catalysts behind the Act, but neither case supports Respondent's policy. Both of the cases were brought under the Equal Protection Clause of the Fourteenth Amendment and the resulting consent orders in the cases noted that the school districts had denied equal educational opportunity to disabled students by withholding educational services to the children merely because the children were disabled and it was allegedly too costly to serve them. The requirements in Mills and PARC were designed by the courts to remedy the discrimination against the disabled plaintiffs. Similarly, the requirements in the Act, including the "stay put" and "free

appropriate public education" provisions, were designed to implement Congress' desire to assure that students with disabilities receive equal access to education. Nothing in the Act states or implies that students with disabilities are entitled to a greater level of educational services than nondisabled students or that students with disabilities -- merely because they are disabled -- are exempt from rules which apply to nondisabled students. As this Court pointed out in Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 189 (1982), the first case to interpret the Act:

> Congress found that of the roughly eight million handicapped children in the United States at the time of enactment, one million were "excluded entirely from the public school system" and more than half were receiving an inappropriate education. [Citations omitted.] In addition, as mentioned in Part I [of the opinion] the Act requires states to extend educational services first to those children who are receiving no education and second to those children who are receiving an "inadequate education." § 1413(3).

> When these express statutory findings and priorities are read together with the Act's extensive procedural requirements and its definition of "free appropriate public education," the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the states and to require the States to adopt procedures which would result in individualized consideration of and instruction for each child. . . By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." [Citation omitted.] Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Id. at 192.

This Court discussed both Mills and PARC, concluding that these cases "both held that

handicapped children must be given access to an adequate, publicly supported education." Id. at 193. Respondent's policy, however, requires that schools provide more than an equal opportunity, more than equal access. It requires that school districts continue educational services to students who have engaged in misconduct, unrelated to their disability, which would cause nondisabled students to lose their right to such services. If there is no relationship between the disability and the misconduct, this requirement goes beyond guaranteeing equal opportunity. It is an affirmative requirement that services be provided to a particular classification of persons without any rational basis. The policy not only exceeds Respondent's authority, it denies equal protection rights of nondisabled students.

This Court's decision in Rowley also discussed Pennhurst State School v. Halderman, 451 U.S. 1 (1981). That case held that

legislation enacted pursuant to the spending clause is in the nature of a contract and the terms of the law must be unambiguous and the state must voluntarily and knowingly accept them. This Court held in Rowley, that scattered remarks in the legislative history of the Education of All Handicapped Children Act relating to achievement of maximum potential, were insufficient to meet the Pennhurst standard. Id. at 204, f. 26. Similarly, Congress has not unambiguously declared its intent to exempt students with disabilities from discipline rules applied to nondisabled students. Respondent cites nothing in either the Act or its legislative history that even addresses the issue of school discipline, much less unambiguously requires that students with disabilities should be exempted from penalties requiring the cessation of educational services. Amicus submits that Respondent would not have the authority to adopt the policy at issue here,

even had it offered appropriate notice and opportunity to comment.

**II. Respondent's policy interferes with state laws and local rules and regulations on student discipline without any expression by Congress that it intended such a result when it passed the Act.**

Historically, states have developed standards for local school boards to set out student conduct policies and penalties for violations of school rules and criminal rules. This Court has recognized on numerous occasions the importance of the state and local policy-making role:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process . . . .

Milliken v. Bradley, 418 U.S. 717, 741 (1974).

Most states either require or permit local school districts to expel students for particularly egregious misconduct and require or permit the district to deny all educational

services to the student during the term of the expulsion.

For example, North Carolina permits student suspension and cessation of all educational services for up to one school year and indefinite expulsion for certain serious offenses. N.C. Gen. Stat. § 115C-391. Massachusetts' statute provides penalties for unauthorized expulsions but implicitly allows expulsion and complete withdrawal of educational services, Mass. Gen. L. Ch. 76 § 16. Texas allows expulsion "without resort to an alternative education program" for commission of certain proscribed offenses, Tex. Educ. Code § 21.3011(b). Colorado, Ohio and New Jersey authorize expulsion of students for certain offenses but include no requirement that educational services be provided during the time of expulsion, Colo. Rev. Stat. § 22-33-106; Ohio Rev. Code Ann. § 3313.66; N.J. Rev. Stat. § 18A:37-2. Minnesota's expulsion statute was amended in

1991 to include a new provision on expulsion of students with disabilities:

> When a pupil who has an individual education plan is excluded or expelled under [the statute] for misbehavior that is not a manifestation of the pupil's disabling condition, the district shall provide special education and related services after a period of suspension, if suspension is imposed. The district shall initiate a review of the pupil's individual education plan within ten days of the commencement of an expulsion, exclusion, or a suspension of ten days or more.

Minn. Stat. § 127.281. Arizona's statute provides for "permanent withdrawal" for certain proscribed offenses, Ariz. Rev. Stat. Ann. §§ 15-840, 15-841. The Arizona Attorney General has ruled that a district may cease all educational services to an expelled handicapped child if the misconduct was not caused by the handicapping condition. Ariz. Op. Atty. Gen. No. 187-044.

State laws, of course, differ in their rules on suspension and expulsion and a minority of states have chosen to require that expelled students be provided educational

services during their expulsion. New York, for example, has no provision for expulsion. However, schools are allowed to "suspend" a child provided educational services are continued. N.Y. Educ. L. § 3214-3e. Connecticut requires school districts to provide alternative educational services to expelled students except where the expulsion arose out of offenses related to drugs or weapons. Conn. Gen. Stat. § 10-233d. In Louisiana, school districts must provide such alternative programs as are specified by the state board of education. La. Rev. Stat. Ann. § 17:416.2. Tennessee's statute encourages the continuation of services during expulsion periods. Tenn. Code Ann. § 49-6-3402 (Supp. 1992). But in each of these states, all students are treated in the same manner so disabled children do not feel that the rules do not apply to them and nondisabled children are not left with the impression that they are being unfairly treated.

Contrary to the majority of state laws in this country, in order to comply with Respondent's policy school districts must treat students with disabilities differently from those without disabilities even where there is no relationship between the misconduct and the disability. Under Respondent's policy, for example, if two students, one with a hearing impairment and one not disabled, were jointly to commit a serious infraction of school rules, such as selling drugs or assaulting a teacher or another student, the hearing impaired child would continue to receive educational services and the other child would lose that right. Since Respondent does not define "educational services" in the policy, parents could argue in the above example that the school must send teachers and a sign language interpreter to the child's home during the time of expulsion in order to provide the required "free appropriate public education." This ludicrous

result was surely not intended by the Congress.

The Act does not provide any guidance with respect to what Congress intended in the area of discipline of students for misconduct unrelated to their disabilities. But Respondent has filled in the void and ruled that Congress, without ever specifically stating so, intended to interfere with the discipline procedures of the local school district and set up a dual system of discipline depending upon whether the children is disabled. It is not conceivable that Congress intended such a result, particularly in view of the fact that expulsion and cessation of educational services has probably been used since the beginning of public education as a disciplinary tool.

This Court was presented with an attack on another time-honored disciplinary tool -- corporal punishment in the case of Ingraham v. Wright, 430 U.S. 651 (1977). The Court ruled

that although some elements might wish to eliminate corporal punishment as a disciplinary tool, nevertheless, the policy decision to eliminate that tool should not be made by the Court. The proper way to make such a choice would be through community debate and legislative action. This Court stated:

> We are reviewing here a legislative judgment, rooted in history and reaffirmed in the laws of many states, that corporal punishment serves an important educational interest.

Id. at 681.

Similarly this Court has recognized that school discipline rules are an important tool in preparing students for life after graduation:

> The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of

> self-government in the community and the nation." [Citations omitted.]

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

Respondent has unilaterally, without authority of the statute, developed a rule for universal application to schools across the country which is in opposition to the educational policy of most states.

**III. There is a conflict in the circuits on the question of whether educational services can be denied to children with disabilities who are disciplined for misconduct unrelated to their disability.**

In 1981 the Fifth Circuit Court of Appeals (later to become the Eleventh Circuit) decided the case of S-1 v. Turlington, 635 F.2d 342, cert. denied, 454 U.S. 1030 (1981), which, although binding only in the Eleventh and Fifth Circuits, has been cited with approval by a number of courts outside those circuits. E.g., School Board of Prince William County v. Malone, 702 F.2d 1210 (4th Cir. 1985); Kaelin v. Grubbs, 682 F.2d 595 (6th

Cir. 1982). S-1 raised a number of issues surrounding the question of whether, and under what circumstances, students with disabilities can be expelled from school.

The court held that "expulsion is still a proper disciplinary tool under the EHA and section 504 when proper procedures are utilized and under proper circumstances. We cannot, however, authorize the complete cessation of educational services during an expulsion period." 635 F.2d at 349.

The Ninth Circuit Court of Appeals decision, Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), which was subsequently affirmed by this Court in Honig v. Doe, ruled to the contrary. In a very lucid discussion of the issue, the court ruled that, although the Act itself does not directly state that disabled students cannot be expelled for misconduct that is a manifestation of his handicap, it "may be inferred from the Act's history, purpose, terms and accompanying regulations."

Id. at 1481. "Congress, having included seriously emotionally disturbed children within the EAHCA's definition of handicapped children, [citations omitted], must have intended that their handicap-related misbehavior should not be a cause for a cessation of educational services." Id. at 1481-82. The court then went on to discuss the issue of expulsion of students for behavior which is unrelated to the handicap and found no reason for treating disabled students any differently than the nondisabled.

> If the child's misbehavior is properly determined not to be a manifestation of his handicap, the handicapped child can be expelled. [Citations, including a citation to S-1 v. Turlington, supra, omitted.] This conclusion does not conflict with the EAHCA. When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all

> educational services -- just as it could in any other case. [Emphasis provided.] To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so.

793 F.2d at 1482.

Although school districts in the Ninth Circuit are authorized by the court of appeals to remove educational services, they apparently risk deprivation of federal funds under the Act if they do so because of the policy interpretation adopted by Respondent. Amicus believes that it is appropriate and compelling for this Court to review this case and require the Department to publish its policy for comment for no other reason than to address the conflict in the circuits. The policy at issue here does not even mention the conflict. It cites only to Mills v. District of Columbia, which as pointed out above does not even support the Department's position.

## IV. Respondent's policy sends a message to children with disabilities that they are exempt from the rules of society and will receive its benefits even though they refuse to obey its rules.

Discipline rules serve two functions, one is to maintain order and create a safe learning environment for all students and the other is an education function, to teach students that they are responsible for their actions and when they violate rules they must suffer the consequences. They are rewarded by their hard work and dedication to the rules, and they are punished for their infractions.

Apparently, Respondent is concerned only about the safety function since its policy is completely oblivious to the practical educational implications of the ruling. For example, the decision in Doe v. Maher includes an interesting discussion of the "manifestation" issue, concluding that:

> [A]lthough [the definition of handicap-related conduct] may, depending on the circumstances, include the conduct of handicapped children who possess the raw capacity to conform their behavior to

> prescribed standards, it does not embrace conduct that bears only an attenuated relationship to the child's handicap. An example of such attenuated conduct would be a case where a child's physical handicap results in his loss of self-esteem, and the child consciously misbehaves in order to gain the attention, or win the approval of his peers. Although such a scenario may be common among handicapped children, it is no less common among children suffering from low self-esteem for other, equally tragic reasons.

793 F.2d at 1480 n.8.

There are numerous examples of disabled students seeking to avoid expulsion on the basis that the proscribed conduct was caused by the disability because of the child's low self esteem and need to get attention through any means. Since the school district must continue to provide educational services to the child under Respondent's ruling, the district may take the road of least resistance and give in to the student, thus providing positive encouragement to the child to use his or her disability as an excuse for his anti-social conduct.

In addition to teaching special education students that their disabilities can excuse their misconduct, Respondent's policy in fact teaches them that their disabilities exempt them from the rules. Respondent's policy allows schools to remove the misbehaving student from school away from other students, but the student with disabilities who violates rules continues to receive education services even though his nondisabled peers in similar circumstances would lose that right. What does that scenario tell the child? "I can do what I want and, although I may be removed from the school in order to protect other students -- I will continue to receive services because I am special ed." Amicus has received reports from across the country of students who respond to teachers' admonitions with retorts such as "You can't touch me, I'm special ed." If Respondent's ruling is allowed to stand, this statement of defiance will in fact reflect the law of the land. It

will be a law of ultimate dismay and sore disadvantage to the students who discover that their exemption from the rules dies on graduation.

Respondent's policy correctly notes Congress' reliance on Mills in adopting the Act, but neglects to mention the ample references in the Act to Congress' goal to use the educational process to develop students with disabilities into productive members of society. As pointed out in the committee report on S.6 which became the predecessor to the IDEA.

> The long range implications of these statistics [showing that only 50 percent of the Nation's handicapped children received proper education services in 1974-75] are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.

S. Rep. No. 168, 94th Cong., 1st Sess. 9 (1975).

An important part of the educational process is learning to obey the rules of society. Telling a child that he or she is exempt from school penalties imposed on all other children does not prepare that child for life in society and governance by the rules of society. That, of course, includes not only the criminal code but rules established by employers. Disabled students will find it very difficult to survive in the world of work if they believe that the employer's rules do not apply to them. It simply is not fair to the student to carve out an exception merely because he or she belongs to a protected class.

Respondent's policy likewise sends the wrong message to nondisabled children. The primary goal of the Act was to integrate students with disabilities into society, "to encourage handicapped children and

nonhandicapped children to be educated together as early as possible, [so that] their attitudes toward each other in later life will not be such obstacles to overcome." 121 Cong. Rec. S 10961 (daily ed. June 18, 1975) (statement of Sen. Stafford). But how are nondisabled children to feel when they lose their right to educational services for the same behavior as a student with a disability who retains the right? That certainly does little to improve their attitude toward such children.

Even were there authority in the Act for the policy adopted by Respondent, which Amicus believes there is not, nevertheless the educational ramifications of the policy cry out for the opportunity for educators across the land to comment on effect of the policy on the education of all children.

**CONCLUSION**

The policy at issue in this case is educationally unsound and has no solid basis

in law. Had the Department provided school districts across the country with the opportunity to comment on the policy, the Department may very likely have concluded that there is no basis in law or educational policy for developing a different rule under the IDEA than under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706, and that rules of the school district should apply in the same manner to both disabled and nondisabled students unless such application has a discriminatory effect (i.e. where the misconduct is a manifestation of the disability).

School districts across the country are vitally interested in this issue and urge

this Court to grant certiorari in this case.

Respectfully submitted

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